

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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B.H., a minor by and through hr Parent,  
Sirbrina Bell,

Case No. 2:23-CV-564 JCM (DJA)

## ORDER

**Plaintiff(s),**

V.

CLARK COUNTY SCHOOL DISTRICT,  
et al.,

Defendant(s).

Presently before the court is defendants Ryan Lewis (“Lewis”) and Kathryn Fitzgerald (“Fitzgerald”)’s motion for partial dismissal of plaintiffs B.H. and Sirbrina Bell (collectively “plaintiffs”)’s complaint. (ECF No. 10). Plaintiffs filed a response (ECF No. 15), to which defendants replied. (ECF No. 21).

19 Defendants Clark County School District (“CCSD”) and Scarlett Perryman (“Perryman”)  
20 joined in defendants Lewis and Fitzgerald’s motion for partial dismissal (ECF No. 12) and  
21 subsequent reply. (ECF No. 22).

## I. Background

This action arises out of the alleged mistreatment of plaintiff B.H. in her special education class. At the time of the incident, B.H. was a five-year-old girl diagnosed with autism spectrum disorder who attended an elementary school within the Clark County School District. (ECF No. 1 at 2, 4).

1           On August 10, 2022, a specialized programs teacher's assistant witnessed Fitzgerald,  
 2 B.H.'s instructor, grab B.H.'s wrist and force her into a bathroom door, where Fitzgerald  
 3 proceeded to turn off the bathroom lights and close the bathroom door. (*Id.* at 5). Fitzgerald  
 4 admitted to the CCSD police department that she locked B.H. in the bathroom and left her there  
 5 because she would not stop singing a nursery rhyme. (*Id.*).

7           The complaint further alleges that Fitzgerald regularly left her students, including B.H.,  
 8 alone in the classroom without supervision for extended periods of time. (*Id.*). The teacher's  
 9 assistant also witnessed Fitzgerald use "corporal punishment" on her students. (*Id.* at 6).  
 10 Specifically, Fitzgerald grabbed B.H. by the hand and squeezed in between her index finger and  
 11 thumb to obtain the child's compliance. (*Id.*). The complaint provides that Fitzgerald went so far  
 12 as to instruct other teachers and their respective aides how to employ this technique. (*Id.* at 7).

14           A CCSD employee reported that Fitzgerald manipulated her classroom door so that it only  
 15 opened if the handle was pulled in an upward direction. (*Id.* at 6). Fitzgerald allegedly  
 16 manipulated the door because most of the disabled students in her class opened it by pulling down  
 17 on the handle, and Fitzgerald understood that manipulating the handle would prevent students with  
 18 disabilities from opening the door, thus trapping them inside the classroom. (*Id.*). Lewis, the  
 19 school's principal, learned of this specific incident, but he failed to discipline any CCSD employee.  
 20 (*Id.* at 2, 6).

23           Perryman, the Region 1 associate superintendent of CCSD, became aware of Fitzgerald's  
 24 actions after communicating with a special education instructional facilitator and a CCSD  
 25 teacher's aide. (*Id.* at 2-3, 7-8). The complaint also alleges that once Perryman began to learn that  
 26 the CCSD police department began investigating Fitzgerald's misconduct, Perryman instructed the  
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1 special educational instructional facilitator to complete a CCF-624 form for every incident  
 2 involving Fitzgerald and to back-date such forms. (*Id.* at 8-9).<sup>1</sup>

3       The CCSD police department investigator concluded that Fitzgerald violated CCSD policy  
 4 and opined that the CCF-624 forms created after the start of the investigation appeared to be “an  
 5 attempted cover-up of failings throughout [the school district].” (*Id.* at 9).

6       B.H. and her mother, Sirbrina Bell, filed their complaint on April 14, 2023, against CCSD,  
 7 Perryman, Lewis, and Fitzgerald, asserting the following causes of action: (1) assault; (2) battery;  
 8 (3) negligence; (4) negligent hiring, training, and supervision; (5) intentional infliction of  
 9 emotional distress; (6) violation of constitutional right to substantive due process; (7) violation of  
 10 constitutional right to equal protection; (8) violation of constitutional protections for disabled  
 11 persons; (9) abuse of a vulnerable person/enhanced damages; and (10) violation of the  
 12 Rehabilitation Act of 1973. (*Id.* at 10-24).

13       Defendants filed the instant motion seeking partial dismissal of plaintiffs’ complaint,  
 14 moving the court to take the following actions: (1) dismiss the official capacity claims against  
 15 Lewis, Fitzgerald, and Perryman; (2) dismiss all claims against Lewis and Perryman except the  
 16 sixth cause of action for violation of a constitutional right to substantive due process; (3) dismiss  
 17 plaintiffs’ fifth cause of action for intentional infliction of emotional distress; (4) dismiss plaintiffs’  
 18 seventh cause of action for violation of constitutional right to equal protection; and (5) deny any  
 19 leave to amend.

20       The court finds that plaintiffs pleaded their causes of action for intentional infliction of  
 21 emotional distress sufficiently to survive a motion to dismiss, but not their cause of action for  
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23       <sup>1</sup> Although not defined in plaintiffs’ complaint, the surrounding language indicates that a  
 24 CCF-624 form is a document that reports an incident involving misconduct.

1 violation of constitutional right to equal protection. Moreover, the official capacity claims against  
 2 Lewis, Fitzgerald, and Perryman are duplicative of the claims against CCSD, thus warranting their  
 3 dismissal.  
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5 Finally, although plaintiffs' response raises valid points as to why certain claims against  
 6 Lewis and Perryman should remain, their complaint fails to specifically name these defendants in  
 7 relation to these claims, warranting dismissal of all causes action against them except for violation  
 8 of a constitutional right to substantive due process.

9 **II. Legal Standard**

10 A court may dismiss a complaint for “failure to state a claim upon which relief can be  
 11 granted.” Fed. R. Civ. P. 12(b)(6). A properly pleaded complaint must provide “[a] short and  
 12 plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2);  
 13 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed  
 14 factual allegations, it demands “more than labels and conclusions” or a “formulaic recitation of the  
 15 elements of a cause of action.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted).

16 “Factual allegations must be enough to rise above the speculative level.” *Twombly*, 550  
 17 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual  
 18 matter to “state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 678 (citation  
 19 omitted).

20 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply  
 21 when considering motions to dismiss. First, the court must accept as true all well-pleaded factual  
 22 allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth.  
 23 *Id.* at 678–79. Mere recitals of the elements of a cause of action, supported only by conclusory  
 24 statements, do not suffice. *Id.* at 678.  
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1           Second, the court must consider whether the factual allegations in the complaint allege a  
 2 plausible claim for relief. *Id.* at 679. A claim is facially plausible when the plaintiff's complaint  
 3 alleges facts that allow the court to draw a reasonable inference that the defendant is liable for the  
 4 alleged misconduct. *Id.* at 678.

5           When the complaint does not permit the court to infer more than the mere possibility of  
 6 misconduct, the complaint has “alleged—but not shown—that the pleader is entitled to relief.” *Id.*  
 7 (internal quotation marks omitted). Additionally, when the allegations in a complaint have not  
 8 crossed the line from conceivable to plausible, the plaintiff's claim must be dismissed. *Twombly*,  
 9 550 U.S. at 570.

10           The Ninth Circuit addressed post-*Iqbal* pleading standards in *Starr v. Baca*, 652 F.3d 1202,  
 11 1216 (9th Cir. 2011). The *Starr* court stated, in relevant part:

12           First, to be entitled to the presumption of truth, allegations in a complaint or  
 13 counterclaim may not simply recite the elements of a cause of action, but must contain  
 14 sufficient allegations of underlying facts to give fair notice and to enable the opposing  
 15 party to defend itself effectively. Second, the factual allegations that are taken as true  
 16 must plausibly suggest an entitlement to relief, such that it is not unfair to require the  
 17 opposing party to be subjected to the expense of discovery and continued litigation.

18           *Id.*

19           If the court grants a Rule 12(b)(6) motion to dismiss, it should grant leave to amend unless  
 20 the deficiencies cannot be cured by amendment. *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d  
 21 655, 658 (9th Cir. 1992). Under Rule 15(a), the court should “freely” give leave to amend “when  
 22 justice so requires,” and absent “undue delay, bad faith, or dilatory motive on the part of the  
 23 movant, repeated failure to cure deficiencies by amendments . . . undue prejudice to the opposing  
 24 party . . . futility of the amendment, etc.” *Foman v. Davis*, 371 U.S. 178, 182 (1962). The court  
 25 should grant leave to amend “even if no request to amend the pleading was made.” *Lopez v. Smith*,  
 26 203 F.3d 1122, 1127 (9th Cir. 2000) (*en banc*) (internal quotation marks omitted).

1           **III. Discussion**

2           A. Official capacity claims

3           Defendants argue that official capacity claims against Lewis, Fitzgerald, and Perryman  
4 should be dismissed, as they are duplicative of official capacity claims against CCSD.

5           “A suit against a government official in his official capacity is equivalent to a suit against  
6 the government itself.” *Larez v. Los Angeles*, 946 F.2d 630, 645 (9th Cir. 2001). Where both the  
7 public entity and a municipal officer are named in a lawsuit, a court may dismiss the individual  
8 named in his official capacity as a redundant defendant. *See Ctr. for Bio-Ethical Reform, Inc. v.*  
9 *Los Angeles Sheriff’s Dep’t*, 533 F.3d 780, 799 (9th Cir. 1986).

10          Plaintiffs assert causes of action against defendants Lewis, Fitzgerald, and Perryman in  
11 both their individual and official capacity. (ECF No. 1). Defendants have represented that they  
12 do not dispute that a claim against them in an individual capacity can be maintained under federal  
13 law. (ECF No. 21 at 3).

14          The official capacity claims against Lewis, Fitzgerald, and Perryman are duplicative of the  
15 official capacity claims against CCSD. Similar to cases involving police officers and claims  
16 asserted under 42 U.S.C. § 1983, official capacity claims against individual school administrators  
17 are duplicative of claims against the school district itself. *See Everett H. v. Dry Creek Joint*  
18 *Elementary Sch. Dist.*, 5 F. Supp. 1164, 1180 (C.D. Cal. 2014) (“[a]lthough Plaintiffs’ First Claim  
19 herein is against the individuals in their official rather than their individual capacities, that  
20 distinction does not help Plaintiffs since suing the administrators in their official capacity is  
21 nothing more than another way of stating a claim against the District itself and is therefore  
22 duplicative”) (citing *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985)).

1           The court dismisses the official capacity claims against Defendants Lewis, Fitzgerald, and  
 2 Perryman, as they are duplicative of claims against CCSD. Lewis, Fitzgerald, and Perryman  
 3 remain defendants regarding claims asserted against them in their individual capacity, except for  
 4 those dismissed for other reasons, as elucidated, *infra*.  
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6           B. Limitation of claims asserted against Lewis and Perryman

7           Defendants aver that all causes of action against Lewis and Perryman, except for violation  
 8 of a constitutional right to substantive due process, should be dismissed because they require a  
 9 great degree of inference as to their conduct and relate to the conduct of Fitzgerald only.  
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11           The crux of the complaint hinges on the actions of and alleged abuse committed by  
 12 Fitzgerald. In their response, plaintiffs argue that although it does not appear “at this early stage”  
 13 that Lewis and Perryman were present when Fitzgerald assaulted, battered, and abused B.H., their  
 14 complaint indeed alleges that Lewis and Perryman were aware of this conduct and ignored it. (ECF  
 15 No. 15 at 9). The rest of plaintiffs’ claims allege a cover-up related to the abuse and neglect, as  
 16 well a failure to supervise, by Lewis and Perryman. (*Id.* at 9-10).

18           The court is tasked with a difficult decision regarding whether to limit the claims asserted  
 19 against Lewis and Perryman. Although plaintiffs’ response to defendants’ motion alleges facts  
 20 that would likely satisfy the pleading standard and survive a motion to dismiss, their complaint,  
 21 which is the operative document in this action, is vague. Specifically, there is no notation next to  
 22 each cause of action showing which claim corresponds to which defendants.  
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24           The role of the court is to be the finder of fact, not to deduce the minutiae of an unclear  
 25 pleading to see which defendants are implicated in certain causes of action. Although plaintiffs  
 26 now task the court to conduct this exercise, it refuses to engage in such a practice. *See Couturier*  
 27 *v. Am. Invscor Corp.*, No. 2:12-cv-01104-APG-NJK, 2013 WL 4499008, at \*3 (D. Nev. Aug. 20,  
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1       2013) (“[a] judge is the impartial umpire of legal battles, not a party’s attorney. He is neither  
 2 required to hunt down arguments the parties keep camouflaged, nor required to address  
 3 perfunctory and undeveloped arguments.”).

4               Given the lack of clarity in plaintiffs’ complaint, the court dismisses all causes of action  
 5 against Lewis and Perryman, except for violation of a constitutional right to substantive due  
 6 process, without prejudice.

8               C. Intentional infliction of emotional distress

9               Defendants next move for dismissal of plaintiffs’ claim for intentional infliction of  
 10 emotional distress.

12               To establish a cause of action for intentional infliction of emotional distress under Nevada  
 13 law, a plaintiff must establish: (1) that the defendant’s conduct was extreme and outrageous; (2)  
 14 that the defendant either intended or recklessly disregarded the causing of emotional distress; (3)  
 15 that the plaintiff actually suffered severe or extreme emotional distress; and (4) that the defendant’s  
 16 conduct actually or proximately caused the distress. *Olivero v. Lowe*, 995 P.2d 1023, 1025 (Nev.  
 17 2000). “Extreme and outrageous conduct is that which is outside all possible bounds of decency  
 18 and is regarded as utterly intolerable in a civilized community.” *Maduike v. Agency Rent-A-Car*,  
 19 953 P.2d 24, 26 (Nev. 1998) (quotation omitted).

21               Defendants posit that this claim fails as a matter of law because allegations of anxiety and  
 22 depression without an indication of treatment are insufficient. (ECF No. 10 at 5); *see Miller v.*  
 23 *Jones*, 970 P.2d 571, 577 (ruling that the plaintiff’s testimony that he was depressed for some time  
 24 but did not seek any medical or psychiatric assistance was insufficient to support an intentional  
 25 infliction of emotional distress claim).

1           Plaintiffs aptly point out that *Miller* was decided at the summary judgment stage, when  
 2 discovery concluded. (ECF No. 15 at 7). Unlike in *Miller*, discovery is still ongoing in this case,  
 3 and additional pleadings may render new facts. Furthermore, plaintiffs' complaint alleges that  
 4 B.H. "was required to incur expenses for medical and psychological/psychiatric care in an amount  
 5 unknown at this time, and will be required to incur expenses in the future for medical and  
 6 psychological/psychiatric care and treatment." (ECF No. 1 at 16). The court thus finds it  
 7 premature to dismiss plaintiffs' claim for intentional infliction of emotional distress.  
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9           Plaintiffs' claim for intentional infliction of emotional distress is pleaded sufficiently, and  
 10 remains in the complaint as asserted against defendants CCSD and Fitzgerald.  
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12           D. Constitutional right to equal protection

13           Finally, defendants move for dismissal of plaintiffs' claim for violation of constitutional  
 14 right to equal protection.<sup>2</sup> The court adopts the test for selective enforcement, as plaintiffs allege  
 15 that CCSD employees enforced certain actions against B.H. that were not inflicted upon other  
 16 students in CCSD who did not suffer from disabilities. (ECF No. 1 at 19).

17           To successfully challenge "selective enforcement" under the Fourteenth Amendment equal  
 18 protection clause, plaintiffs must demonstrate (1) that enforcement had a discriminatory effect and  
 19 (2) the [defendants] were motivated by a discriminatory purpose. *Rosenbaum v. City & Cnty. of*  
 20 *San Francisco*, 484 F.3d 1142, 1152 (9th Cir. 2007) (citation omitted). "In addition to the showing  
 21 of discriminatory purpose and effect, plaintiffs seeking to enjoin alleged selective enforcement  
 22 must demonstrate the [defendant's] misconduct is part of a 'policy, plan, or a pervasive pattern.'"  
 23 *Id.* at 1153 (citing *Thomas v. Cnty. of Los Angeles*, 978 F.2d 504, 509 (9th Cir. 1993)).  
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 28           <sup>2</sup> Plaintiffs allege violations of the equal protection clause of the Fourteenth Amendment  
 to the United States Constitution and Article 1, § 9 of the Constitution of the State of Nevada.  
 (ECF No. 1 at 19).

1           Discriminatory effect is shown when a plaintiff demonstrates that other similarly situated  
 2 individuals not in the plaintiff's protected class were not subject to the same conduct. *United*  
 3 *States v. Armstrong*, 517 U.S. 456, 465 (1996). "To show discriminatory purpose, a plaintiff must  
 4 establish that 'the decision-maker . . . selected or reaffirmed a particular course of action at least  
 5 in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.'" *Rosenbaum*,  
 6 484 F.3d at 1153 (quoting *Wayte v. United States*, 470 U.S. 598, 610 (1985)).

7           Plaintiffs' complaint fails to allege that similarly situated individuals were not subject to  
 8 the same discrimination alleged by B.H. The complaint consists of blanket and conclusory  
 9 assertions that non-disabled student received preferential treatment. (ECF No. 1 at 19-20).

10           Historically, "threadbare allegations" of "different treatment to similarly situated  
 11 individuals" would defeat a motion to dismiss. *Kansas Penn Gaming, LLC v. Collins*, 656 F.3d  
 12 1210, 12-18-19 (10th Cir. 2011). In the wake of *Twombly* and *Iqbal*, the legal standard must be  
 13 applied with care. *Id.* at 1219. Therefore, "it is imperative for the class-of-one plaintiff to provide  
 14 a specific and detailed account of the nature of the preferred treatment of the favored class."  
 15 *Jennings v. City of Stillwater*, 383 F.3d 1199, 1214.

16           There simply is not enough detail in plaintiffs' complaint to satisfy this burden, as there  
 17 are no specific allegations of different treatment B.H. received compared to similarly situated  
 18 individuals not in her protected class.

19           Plaintiffs' claim for violation of constitutional right to equal protection as to defendants  
 20 CCSD and Fitzgerald is dismissed without prejudice.

21           E. Leave to amend

22           Plaintiffs request that the court permit them leave to amend their complaint if the court  
 23 were to dismiss any causes of action. (ECF No. 15 at 10).

1           The court should freely give leave to amend when justice so requires. *See Fed. R. Civ. P.*  
 2       15(a)(2). “In the absence of any apparent or declared reason—such as undue delay, bad faith or  
 3       dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments  
 4       previously allowed, undue prejudice to the opposing party by virtue of allowance of the  
 5       amendment, futility of amendment, etc.—the leave should, as the rules require, be ‘freely given.’”  
 6       *Foman v. Davis*, 371 U.S. 178, 182 (1962). Leave to amend should be granted if it appears at all  
 7       possible that a plaintiff can correct any defect. *See generally Lopez v. Smith*, 203 F.3d 1122 (9th  
 8       Cir. 2000).

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 10      The court grants leave for plaintiffs to amend their complaint. Plaintiffs have yet to file an  
 11     amended complaint in the action. Additionally, allowing plaintiffs to amend their complaint would  
 12     not cause undue prejudice to defendants. Finally, there is a probability for plaintiffs to cure the  
 13     defects in their complaint if given leave to amend.

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 15      **IV. Conclusion**

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 17      Accordingly,

18      IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendants Ryan Lewis,  
 19     Kathryn Fitzgerald, Clark County School District, and Scarlett Perryman’s motion for partial  
 20     dismissal of plaintiffs B.H. and Sirbrina Bell’s complaint (ECF No. 10), be, and the same hereby  
 21     is, GRANTED IN PART and DENIED IN PART.

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 23      The official capacity claims against defendants Ryan Lewis, Kathryn Fitzgerald, and  
 24     Scarlett Perryman are dismissed without prejudice.

25      All causes of action against defendants Ryan Lewis and Scarlett Perryman, except for  
 26     violation of a constitutional right to substantive due process, are dismissed without prejudice.

1 Plaintiffs' claim for violation of constitutional right to equal protection as to defendants  
2 Clark County School District and Kathryn Fitzgerald is dismissed without prejudice.  
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4 Plaintiffs' claim for intentional infliction of emotional distress remains in the complaint as  
5 asserted against defendants Clark County School District and Kathryn Fitzgerald.  
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7 Plaintiffs shall file any amended complaint within twenty-one (21) days of receiving this  
order.  
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DATED December 18, 2023.

9   
10 UNITED STATES DISTRICT JUDGE

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